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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAULINE CALDWELL,

Plaintiff - Appellant,

v.

STATE OF WASHINGTON, Department of Social and Health Services; LARRY MERXBAUER; JANE DOE MERXBAUER, and the marital community comprised thereof; JAN BLACKBURN; JOHN DOE BLACKBURN, and the marital community comprised thereof; SHARON BUSS; JOHN DOE BUSS, and the marital community comprised thereof; SHEILA TOMAIER; JOHN DOE TOMAIER, and the marital community comprised thereof; WASHINGTON FEDERATION OF STATE EMPLOYEES; AFL-CIO, LOCAL 491,

Defendants - Appellees.

No. 06-35707

D.C. No. CV-05-00435-JLR

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
James L. Robart, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted February 6, 2008
Seattle, Washington

Before: FISHER, GOULD, and IKUTA, Circuit Judges.

Pauline Caldwell ("Caldwell") appeals the district court's grant of summary judgment to her employer[1] and union on her claims of racial discrimination and, as against the union, breach of 42 U.S.C. § 1981, RCW § 49.60 (Washington Law Against Discrimination), and the duty of fair representation. We have jurisdiction under 28 U.S.C. § 1291, and reviewing the district court's decision de novo, *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004), we affirm.

Caldwell did not establish any genuine issues of material fact regarding her claim of a racially hostile work environment. Although Caldwell experienced the environment under supervisor Sheila Tomaier ("Tomaier") as subjectively hostile, Caldwell did not produce evidence sufficient to survive summary judgment that the conduct she experienced was objectively "severe or pervasive" enough to "alter the conditions of [her] employment and create an abusive work environment." *Manatt v. Bank of Am.*, 339 F.3d 792, 798 (9th Cir. 2003) (citations and internal quotation marks omitted). The verbal criticism Caldwell received from her supervisor was

[1]In addition to granting summary judgment to the State of Washington, Department of Social and Health Services, the district court gave summary judgment to its employees Merxbauer, Blackburn, Buss, and Tomaier.

similar in severity to treatment that we have previously held not to constitute a hostile work environment. *See Vasquez v. County of Los Angeles*, 349 F.3d 634, 642-43 (9th Cir. 2003). Moreover, Caldwell did not establish that any alleged harassment she suffered during the relevant time period was "of a racial . . . nature." *Id.* at 642.[2] She therefore did not carry her burden of producing a triable issue of fact as to "whether a reasonable African-American [wo]man would find the workplace so objectively and subjectively racially hostile as to create an abusive working environment . . . ." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004).

Caldwell also did not establish triable issues of fact on her claim of disparate treatment regarding the promotion to a permanent FA1 position at the Rainier School. Caldwell presented a successful *prima facie* case of disparate treatment under the *McDonnell Douglas* framework despite the fact that the chosen candidate was a member of the same relevant protected class as Caldwell. *See Diaz v. AT&T*, 752 F.2d 1356, 1361 (9th Cir. 1985). However, she was unable to show, by direct

[2]While the Supreme Court has allowed racially-based conduct occurring outside the 300-day filing period of Title VII to be considered "for the purposes of assessing liability, so long as any act contributing to that hostile environment takes place within the statutory time period[,]" *Amtrak v. Morgan*, 536 U.S. 101, 105 (2002), Caldwell points to no conduct "of a racial nature" occurring within the statutory period with which the 2001 Jesse Jackson incident could be linked for the purposes of asserting an ongoing racially hostile environment.

or circumstantial evidence, that the state's proffered nondiscriminatory reasons for its hiring decisions, the superior qualifications and experience of both Donnell Daniels and Lynette Ryder, were a pretext for unlawful discrimination. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981). Even accepting all of Caldwell's allegations and reasonable inferences therefrom as true, the evidence suggests only that the stated reasons for failing to promote Caldwell were a pretext for offering the position to a personal friend of Tomaier, not that they were a pretext for racial discrimination. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000).

Finally, Caldwell did not produce sufficient evidence to withstand summary judgment on her claims against the Washington Federation of State Employees ("the union"). She was unable to show that the union's failure to bring a grievance for her was based on discriminatory intent, a necessary prerequisite to a successful claim against the union under 42 U.S.C. § 1981. *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982). Jeff Ramsdell's decision not to process Caldwell's grievance can plausibly be explained by the fact that any grievance would have been untimely, and therefore futile, by the time Caldwell gave Ramsdell the letter outlining her complaints. Furthermore, any inference of discriminatory motive is negated by the multiple occasions when union

representatives assisted Caldwell in her meetings with supervisors about the alleged discrimination she was experiencing.

Given the defects in Caldwell's hostile work environment claim, it was also not a violation of RCW § 49.60 or the duty of fair representation for the union to fail to pursue a grievance on Caldwell's behalf. Caldwell did not produce sufficient evidence of affirmative discrimination on the part of the union to survive summary judgment, and it was neither arbitrary nor an act of bad faith for Jeff Ramsdell to decline to file an untimely, and hence meritless, grievance for her. *See Galindo v. Stoody*, 793 F.2d 1502, 1513 (9th Cir. 1986).

AFFIRMED.